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No. 08-88

IN THE
Supreme Court of the United States

STATE OF VERMONT,

Petitioner,

v.

MICHAEL BRILLON,

Respondent.

On Writ of Certiorari to the Vermont Supreme Court

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Does the state bear responsibility under *Barker v. Wingo*, 407 U.S. 414 (1972), for pretrial delays in the following circumstances:

a. When the state fails to assign counsel?

b. When the state assigns pro forma counsel who provide nothing in the way of representation before their contractual duty to represent the defendant lapses, and they withdraw?

c. When the court continues a case, which it has deemed ready for trial, for seven months, in part because of a backlog of similar high-priority cases on the docket, and then allows two trial dates to pass *sine die* without explanation?

d. When the prosecutor is dilatory in providing discovery and a witness list?

2. Whether the Vermont Supreme Court correctly balanced the four *Barker* factors in furtherance of the private, public and institutional interests which the speedy trial clause is intended to protect?

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STATEMENT OF THE CASE

The nearly three years between Brillon's July 30, 2001 arraignment and his June 14, 2004 trial began and ended with the normal activities of pretrial preparation. In between was a lengthy period of inaction punctuated by continuances, withdrawals of counsel, and missed dates.

The Vermont Supreme Court counted none of the time between arraignment and June 11, 2002 against the State's speedy trial clock. Pet. App. 24-25. After this first period, however, the court found that much of the delay in getting Brillon's case to trial "was not attributable to defendant, but to the system." Pet. App. 7. The Court summarized its findings:

> Defendant's fourth attorney, who was assigned in June 2002, stated at an August 2002 status conference that he needed an additional two months to prepare the case, and yet he apparently did little or nothing and finally conceded at a November 2002 status conference that his contract with the defender general[1] had expired and he was giving up criminal defense work. A fifth attorney was not formally assigned until January 2003, and he was allowed to withdraw four and one-half

[1] Vermont's defender general is the state officer in charge of assigning counsel for indigent defendants. He may do this through state-employed public defenders, private lawyers engaged as "assigned counsel contractors," or "ad hoc" counsel assigned to individual cases. Vt. Stat. Ann. tit. 13 § 5253(a)-(b); Vt. Admin. Order No. 4 §§ 3-4, 6.

> months later without having done anything because of a change in his contract with the defender general's office. At that point, defendant had been incarcerated without a trial for approximately two years, and yet he was entirely without counsel for the next four months until the next assigned counsel took over in August 2003. Despite the already significant delay, the prosecution stipulated to several more continuances before a trial was finally held in June 2004.

Pet. App. 27.

The following Statement of the Case is divided into two parts. The first responds to Vermont's argumentative and inaccurate version of the case. Pet'r Br. 9-23. The second presents the facts as they appear in the record.

I. VERMONT'S FALSE PICTURE OF THIS CASE.

Vermont's brief improperly attempts to rewrite the record that the Vermont Supreme Court reviewed and relied on in reaching its fact-specific holding that administrative failures, not Brillon or his counsel, were responsible for four specific periods of delay. By putting most of its factual presentation in the "Argument" section, Vermont frees itself from the strictures of an objective statement, and exploits that strategy to spin a story. The story has a theme: that Brillon, despite his incarceration, despite what the record says and despite what courts below found and declined to find, secretly wanted to delay his case as long as possible and manipulated the

proceedings to that end. It has a surprise ending: that after delaying the case for almost three years, he managed to fool the Vermont Supreme Court into thinking that the delays were the State's responsibility, not his.

We summarize Vermont's story in indented text and point out its utter lack of record support.

> *Brillon wanted Judge Carroll disqualified from the case, but his motion to recuse was denied. Judge Carroll was scheduled to rotate to another county in March, so "Brillon still had the possibility of removing [her] from the case" by persuading his lawyer to move for a continuance. Pet'r Br. 10. "If Brillon could possibly delay the trial past March, he would be guaranteed a different judge." Id. So when the State moved for February trial, Brillon's public defender, Richard Ammons, responded with two continuance motions. "Tellingly," Vermont writes, Ammons sought a delay until April, by which time "Judge Carroll would have rotated out of Bennington County." Id. 11. When the judge denied the continuance, Ammons moved to withdraw for a number of reasons. The court allowed Ammons to withdraw and "[a]s a result, Brillon got the delay he wanted and a new judge." Id. 14.*

Neither the trial court nor the Vermont Supreme Court found any such facts. As the Vermont Supreme Court read the record, Ammons withdrew "because of [his] failure to be ready for trial, not because of defendant's actions." Pet. App. 25.

Ammons stated that he was carrying a caseload of 174 clients and that he was not prepared for trial. J.A. 97-99, 165-67.

Brillon heard Ammons state that he was not prepared on the Friday before a Tuesday jury draw. *Infra* 8-10. The Vermont court found that Brillon consented to Ammons' withdrawal only grudgingly, because it was apparent that Ammons, by his own admission, was "not prepared to go forward with a trial." Pet. App. 19. The court nevertheless did not charge this time against the state. *Id.*

> *The trial date was cancelled and on March 1, 2002, Brillon was assigned new counsel, Gerald Altieri. Judge-shopping was no longer a motive, but Brillon still wanted to delay the case as long as he could. He moved for a substitute for Altieri in May, complaining about Altieri's lack of preparation and communication. "Mr. Altieri disagreed with most of Brillon's claims." Pet'r Br. 16. Altieri was prepared to stay on the case, so, "confronted with the prospect of an impending trial, Brillon managed to derail the proceedings by threatening his lawyer during a break in the proceedings." Id. 6, 17-19.*

In fact, Altieri admitted that most of Brillon's factual assertions were true, though he defended his efforts. J.A. 206, 216-17. No trial was "impending" at the time; the earliest a trial could be had was in September. *Id.* 219. Nothing in the record suggests that Brillon's outburst was a ploy designed to delay the trial. We provide the details at 11-13, *infra*. The

Vermont court held that this period also should not be counted against the state. Pet. App. 25.

> *Altieri was replaced by Paul Donaldson, whom Brillon then "fired." Pet'r Br. 20. Brillon wrote to the judge complaining "that Mr. Donaldson was not qualified to be his lawyer. . . . Then, on October 22, 2002 – again on the eve of trial – Brillon moved to dismiss Mr. Donaldson." Id. "Confronted with Brillon's behavior," Vermont writes, Donaldson then "advised the court that his contract with the Office of the Defender General had expired, and that he was seeking to have the case reassigned." Id. 6.*

The Vermont Supreme Court found, and the record establishes, that Donaldson was allowed off the case because his contract had expired and the defender general's office (hereafter, "DG") was seeking to have the case reassigned. Pet. App. 27. There is no substance to the claim that Donaldson withdrew for any reason connected "with Brillon's behavior." Furthermore, Donaldson's withdrawal did not result in the cancellation of any trial date. The court had scheduled the trial for October, but for reasons which the record does not explain, October had passed with no trial and no new date for one. J.A. 23-24; *infra* 14-15.

> *Brillon was then left with no lawyer at all, a situation he brought upon himself, because "by firing three lawyers and threatening one of them, he made it extremely difficult for the Defender General to obtain replacement*

> *counsel . . . .” Pet’r Br. 23. The difficulty was understandable, because “a rural state like Vermont” has “a paucity of criminal lawyers.” Id. 29. Brillon is also to blame for a second reason: because “there is good cause to believe that the difficulties in finding replacement counsel were likely due to Brillon’s threat on Mr. Altieri’s life.” Id.* 33.

Donaldson, as noted, was allowed out of the case for contract reasons (as was David Sleigh, the attorney who was appointed to replace him). The record does not establish the claimed “paucity of criminal lawyers.” The “good cause to believe” that “Brillon’s threat on Altieri’s life” had anything to do with the six months of unrepresentation is pure fantasy.

II. THE RECORD FACTS.

Part I of this Statement of the Case was required in order to correct the misleading and factually inaccurate version of the case tendered to the Court by Vermont’s brief. We now provide the Court with a correct account of the relevant facts of record.

A. July 27, 2001 to July 30, 2001.

On July 27, 2001, Brillon and his estranged girlfriend, Michelle Tatro, met in her home and began arguing. When Michelle left, Brillon followed her to her car and struck her in the face. The police were called and Brillon was arrested. Pet. App. 8-9.

On July 30, 2001, Brillon was charged with domestic assault. J.A. 11-12. Because he was

forbidden by an earlier criminal court order from harassing his girlfriend, he was charged with second-degree aggravated assault, a felony offense. Vt. Stat. Ann. tit. 13, § 1044(a)(1). Because he had three prior felony convictions, he was charged as a habitual offender under Vt. Stat. Ann. tit. 13, § 11, exposing him to a life sentence. Pet. App. 3-4, 9.

B. July 30, 2001 to February 25, 2002.

The public defender was assigned to represent Brillon. Marie Wood of the Bennington public defender's office appeared at his arraignment on July 30. July 30, 2001 Tr. 1. The court ordered Brillon held without bail pending an evidentiary bail hearing, later scheduled for August 15. J.A. 13-14.

Richard Ammons took over the case from Wood. The day before the bail hearing Ammons and the prosecutor stipulated to a continuance because Ammons, who had started at the public defender's office the previous month, was moving his former practice that day. Pet. App. 17-18; J.A. 97.

On September 20 Brillon wrote to the court complaining of delay. J.A. 151. *See* Pet. App. 29-30.

The bail hearing was convened on October 2, 2001, but before it began Ammons requested a continuance so that he could file a motion to recuse the trial judge, Hon. Karen Carroll, who had presided over a family-court dispute arising from the charged assault. Ammons stated that the delay resulting from the motion would not count toward any speedy-trial claim. Oct. 2, 2001 Tr. 3.

The next day, Ammons moved to recuse Judge Carroll.[2] Appellant's Printed Case ("P.C.") 22.[3] The motion was denied by Judge Carroll on October 9, and by an administrative judge on November 20. J.A. 16.

February 2002 trial date. On December 27, the prosecutor requested that a trial date be set not later than February 2002, noting that Brillon had been in custody for five months and representing that discovery was complete. J.A. 89-90. Ammons filed no opposition and the court granted the request. Pet. App. 18; J.A. 17.

The bail hearing was held on January 16, 2002, and the court denied bail that day. Pet. App. 18.

The next day, January 17, Ammons moved for a trial date continuance on the ground that further investigation was necessary. J.A. 91-93. Judge Carroll denied the motion and set the jury draw for February 26, with trial to begin the next day. Pet. App. 18-19.

On February 22, Ammons filed a second motion for a continuance. He represented that he was unready for a February trial because of extraordinary caseload pressures, and asked that the

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[2] The Vermont Supreme Court and the Solicitor General mistakenly identify the recusal motion as "pro se." Pet. App. 18, Amicus Br. of United States 3.

[3] The "printed case" is a paginated collection of "such extracts from the record as are necessary to present fully the questions raised," filed in the Vermont Supreme Court. Vt. R. App. P. 30(a).

trial be postponed until April. J.A. 97. According to Ammons, when he joined the public defenders' office on July 1, he inherited a backlog of "unfinished and untouched cases," *id.* 97-98, which his predecessor had "allowed . . . to sit, quite frankly," *id.* 165, and he was also taking on his share of incoming cases. As of the motion date, he was carrying a caseload of 174 clients with 331 charges, 55 of which were felonies. Because of his partner's vacation schedule, he was the only full-time attorney in the office. *Id.* 97-99, 165-67. He had learned of new witnesses whom he thought would be relevant, but there were ethical issues, which he preferred not to discuss, about using them. *Id.* 169-70.

The court denied the motion. At the end of the hearing, Brillon, who had listened to the proceedings by telephone, told Ammons, "You're fired, Rick." Pet. App. 19; J.A. 187.

On February 25, one day before the jury draw, Ammons filed a motion to withdraw, representing that Brillon had "discharged" him at the close of the previous hearing because of Ammons' failure to be ready for trial and to maintain communications, and because of "certain irreconcilable differences in preferred approach . . . as to trial strategy." J.A. 103-106. Ammons also claimed conflicts of interest based on the public defenders' representation of newly-interviewed witnesses. *Id.* 105. At a hearing the same day, Ammons said he had been advised to withdraw by the DG. *Id.* 191-92. The court warned Brillon that granting the motion would mean further delay, but Brillon stated that he had no choice

because Ammons was not prepared for trial. *Id.* 197. The court granted the motion to withdraw, ordered appointment of a new lawyer, and scheduled a status conference in 30 days. *Id.* 21; Pet. App. 19.

C. February 25, 2002 to June 11, 2002.

The court appointed a replacement for Ammons, Matthew Harnett, an assigned counsel contractor, on February 28, 2002. The following day, Harnett reported a conflict of interest. J.A. 21; Pet. App. 19-20.

On March 1, the court appointed another assigned counsel contractor, Gerald Altieri. J.A. 21; Pet. App. 19-20.

September or October 2002 trial date. No new trial date appears on the docket after the February 26 jury draw was cancelled. J.A. 21-23. Some time between February 26 and June 11, however, both Altieri and the prosecutor learned that Brillon's case was not going to be put on a jury list before September 2002. By the time of the June 11 hearing, Altieri understood that the case was not "coming up on the trial radar until September at the least. . . ." *Id.* 219. The prosecutor agreed and explained his understanding:

> Mr. Altieri and I apparently had the same conversation with either the judge or the clerks downstairs that the backlog related to other cases and specifically other 60-day

> cases[4] necessitated Mr. Brillon being put off because he brought up – he was brought up to the eve of trial. He had the trial dates reserved and he did not use them.

Id. 220-21.

The status conference that Judge Carroll had ordered thirty days from February 25 was not scheduled on the docket and was not held. *Id.* 21. No status conference was held in March. *Id.* No status conference was held in April. No hearing of any kind was held until June 11. *Id.* 21-22.

On April 2, Altieri filed a notice that Brillon intended to use "the doctrine of self-defense." *Id.* 21. That was Altieri's only docketed filing in the case. *Id.* 21-23.[5]

On May 20, Brillon filed a motion for substitute counsel, alleging that Altieri had not filed motions, had virtually no communication with Brillon, had not provided Brillon with discovery material, and told Brillon that "he [Altieri] cannot be diligent because of [his] heavy case load." *Id.* 113-14; Pet. App. 20.

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[4] *I.e.*, cases in which a defendant is held without bail for an offense not punishable by death or life imprisonment. Vt. Const. ch. II, § 40.

[5] The notice read in full: "Now comes the defendant, Michael Brillon, by and through undersigned counsel and pursuant to V.R.Cr.P. 12.1 and hereby gives notice that he intends to utilize the doctrine of self-defense in the above-entitled action." P.C. 54.

At the June 11 hearing Brillon represented that Altieri had spoken with him twice since his assignment in March, once for twenty minutes and another time for about ten minutes, "in the hall and it must have been ten guys lined up to see him." J.A. 208-09, 212. Brillon complained that Altieri had not spoken to his witnesses and had not given him the discovery completed by Ammons. *Id.* 211-13. Altieri said he had spoken with Brillon "for almost two hours." *Id.* 207. As for the depositions, Altieri conceded that Brillon "may have a valid complaint. I haven't gotten him all the depositions he wants." *Id.* Altieri acknowledged he had not spoken to Brillon's witnesses, though he disagreed whether it was necessary. *Id.* 216-17. He acknowledged that motions needed to be filed, but he believed he still had time to do so because the case would be tried in September at the earliest. *Id.* 218-19.

In the course of the hearing Brillon and Altieri engaged in heated, hostile exchanges. The judge, Hon. John P. Wesley, threatened both of them with contempt if they continued their in-fighting. *Id.* 214, 216, 225.

Towards the end of the hearing Altieri stated that during a break Brillon told Altieri "emphatically" that Brillon did not want Altieri as his lawyer, "and I understand that but I won't tolerate the threats to my life." *Id.* 224. He continued, addressing Brillon, "maybe before you make those threats you should learn a little bit about my background. . . ." *Id.* Brillon denied he had threatened Altieri's life. *Id.* 224, 225. According to Altieri, Brillon stated, "If it

takes 20 years to get even with you, I will get you." *Id.* 224.

The court granted Altieri leave to withdraw based on the "breakdown" in their relationship, and warned Brillon that he was not entitled to manage every aspect of his defense and that appointing a new lawyer would result in further delay. *Id.* 226-28.

D. June 11, 2002 to November 26, 2002.

On June 11, the same day that Altieri was removed, attorney Paul Donaldson, another assigned counsel contractor, was assigned. *Id.* 23; Pet. App. 20.

No other action appears on the docket in June 2002. J.A. 23. No other action appears on the docket until July 30, when a status conference was set for August 5. *Id.*

At the August 5 conference, Donaldson represented that there was "a lot of discovery that [Brillon's] prior attorneys never got to for one reason or another," and asked for additional discovery time to interview six to eight additional witnesses. Aug. 5, 2002 Tr. 3, 6; Pet. App. 21. Donaldson found it "difficult to say" how much additional time he needed, given his "other case load" and "other obligations," but he thought that two months could be "less than adequate." Aug. 5, 2002 Tr. 4.

October 2002 trial date. The court ordered the defense to file objections in writing to any of the State's offered "bad act" evidence by August 23 and to disclose its additional witnesses by September 16. J.A. 23; Pet App. 21. The court ordered the

prosecution to file any motions regarding defense disclosures by September 23. J.A. 23. The Court ordered the case to be placed on the October jury list, "with priority given due to Defendant's custody status." *Id.*; Pet. App. 21.

On August 23, the deadline to file defense oppositions to the State's "bad act" evidence, Donaldson filed nothing. J.A. 23.

On August 28, Brillon wrote a letter to Judge Wesley (filed but not docketed) indicating his concern about Donaldson's inaction and lack of response to his letters. P.C. 66; Pet. App. 21.

On September 16, the deadline to file disclosure of defense witnesses, Donaldson filed nothing. J.A. 23.

No docket entries in September or October establish a date certain for an October jury draw in Brillon's case. The docket indicates no cancellation of the October trial and no rescheduling or other action by the clerk or the judge. *Id.* 23-24.

On October 22, Brillon filed a pro se motion asking that Donaldson be replaced. *Id.*; Pet. App. 21. Brillon stated that Donaldson had not filed motions, had refused to provide Brillon with discovery materials, and had engaged in "virtually no communication." J.A. 115.

Donaldson filed no response. *Id.* 24.

October passed with no jury draw and no new date for a jury draw. *Id.* 23-24.

Sometime in late October, as revealed at the next hearing, the DG sent Brillon a letter explaining that Donaldson would be replaced by Debra Loevy-Reyes. *Id.* 233-34.

On October 31, a hearing on Brillon's motion was scheduled for November 13. *Id.* 24. On November 13, Brillon was not transported from prison to court so the hearing was not held. *Id.* On November 15, the hearing was reset for November 26, 2002. *Id.*

The November 26 hearing was held before Judge David Suntag. *Id.* The judge asked Donaldson for his response to Brillon's motion. *Id.* 232. Donaldson replied as follows:

> Judge, I – by way of explanation, Judge, um, I've been going out of the private practice of criminal defense work. In fact, my contract with the Defender General's office had expired in June, which was in Mr. Brillon's case was (unintelligible) me basically the beginning of my departure from the contract. Um, I had been discussing with the Defender General's office in getting Mr. Brillon's case, among others, reassigned because of the nature of the case and just because it's, you know, the nature of the case.

Id. 232-33; *see* Pet. App. 21.

Donaldson further explained that, "I had been told by the Defender General's office that they were going to reassign the case. They were going to have new counsel assigned that was more able and more equipped to deal with the case." J.A. 233; Pet. App.

21-22. Donaldson produced the October letter from the DG to Brillon advising that Brillon's case was going to be assigned to Loevy-Reyes. J.A. 233-34. According to the prosecutor, Loevy-Reyes was "somewhere along the line of 7 or 8 months pregnant" and she "conveyed to me that she will be missing some time as a result of her pregnancy . . . ." *Id.* 234.

Judge Suntag understood that Donaldson would not be continuing his representation of Brillon:

> But I don't, and if what I'm hearing from Mr. Donaldson is that he's not going to be representing him anyway. I mean, it's not even a question of whether or not he's going to be dismissed from the case. If he doesn't have the contract any more, it's supposed to be reassigned in the first place anyway.

Id. At no point in the hearing did Donaldson dispute any of the allegations in Brillon's motion. *Id.* 232-35, 239-40.

The judge released Donaldson from the case:

> [T]his is what I'll do. Mr. Donaldson is going to be out, obviously, for all reasons, including yours [*i.e.*, Brillon's]. I'll release him from the case, contact the Defender General's office and tell him immediately assign whoever it is [that] you're going to assign, uh, to the case you know and have that person determine immediately whether or not she or he can do it and whether there's a conflict. And if not tell me and we'll get somebody else assigned and

> we'll just work it as quickly as we can in order to get you counsel.
>
> * * *
>
> We will . . . notify the Defender General to reassign immediately and I want a report within two weeks at the outside whether reassigned counsel has any conflict.

Id. 238-40.

E. November 26, 2002 to January 22, 2003.

On November 26, the docket states the following regarding Brillon's new counsel:

> Note: This defendant's cases are being reassigned to the Serious Felony Unit – David Sleigh. Lora Evans[6] to notify Atty Sleigh of the assignment, this court to send notice to Mr. Sleigh of next court date.

Id. 24-25. That same day, the clerk scheduled a status conference for January 8, 2003. *Id.* 25.

In December 2002, no action appears on the docket. *Id.*

On January 8, Judge Carroll presided over the status conference. *Id.* 25, 244. She stated, "I'm not exactly sure of the history of Mr. Sleigh's appointment or non-appointment to the case because I'm just sitting in today." *Id.* 244.

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[6] Lora Evans was the business manager at the defender general's office. J.A. 160.

Sleigh, whose office was in St. Johnsbury, about 160 miles from Bennington, *see* P.C. 77, was present by telephone. J.A. 243. Sleigh told the judge that he did not believe that he currently represented Brillon. *Id.* 244. Sleigh stated that he had been advised in December 2002 that he "might" be assigned to the case, but "[a]s far as I'm concerned, at this point I'm just another lawyer in Vermont." *Id.* He further stated that the DG had instructed him to review the file and determine if he had a conflict, but to that date he had received no further paperwork. *Id.* 244-45; Pet. App. 22. He added, "[a]ssuming that I receive a notice to assign [sic] counsel assigning me to this case which I have yet to receive," he would review it to see whether there was a conflict of interest involving prior counsel, "because my contract only obliges me to appear in cases where there has been a disqualifying conflict of interest by predecessor counsel." J.A. 245-46.

Judge Carroll ordered the DG to designate an attorney to represent Brillon within 14 days. *Id.* 252-53, 83; Pet. App. 22. The prosecutor noted that this order was similar to Judge Suntag's order at the November 26 hearing, and that the DG had either "ignored Judge Suntag's Order, or not complied with it in such a manner that made representation of Mr. Brillon possible. . . ." J.A. 249.

On January 15, the DG wrote Judge Carroll advising that Sleigh was assigned to the case:

> On November 26, 2002, we were notified by the court of the need for assignment of counsel in these matters. After conferring with the

> clerk on that day and the next day, we advised the clerk that these cases should be assigned to David Sleigh. . . . On December 2, 2002, we notified Mr. Sleigh that these cases would be assigned to him by the court. Apparently the Court never sent Mr. Sleigh notice of assignment prior to the status conference.

Id. 155-56. On January 22, the court issued a formal notice of assignment of David Sleigh. *Id.* 84-85.

F. January 22, 2003 to April 11, 2003.

May 2003 trial date. On February 19, an off-record status conference was held, at which Judge Suntag ordered Altieri and Donaldson to transfer files to Sleigh. *Id.* 25-26. Judge Suntag set a March 30 defense deadline for disclosure of witnesses and an April 30 deadline for defense motions and completion of discovery. *Id.* 26. He ordered the trial to be held "late May 2003[;] 2 days." *Id.*

Sleigh was in trial out of state from February 3 to February 21. *Id.* 117. On February 25, 2003, he filed a motion to extend the witness-list date from March 30 to April 11, and the discovery and motion deadline from April 30 to May 15. *Id.* He did not ask for a continuance of the "late May" trial. *Id.* The motion was granted "Per State Agreement" on March 17. *Id.* 27.

On April 10, Sleigh sent a letter to Brillon stating: "As a result of modifications to our firm's contract with the Defender General, we will not be representing you in your pending case. Lora Evans

of the Defendant General's office is working to secure new counsel for you." *Id.* 158.

On April 11 Sleigh filed notice of his withdrawal from the case. *Id.* 118; Pet. App. 22-23. The docket entries do not record any response to this notice by either the court or prosecutor. J.A. 27.

G. April 11, 2003 to August 4, 2003.

For the next four months, from Sleigh's April 11, 2003 notice of withdrawal until the first appearance of Attorney Kathleen Moore on August 11, 2003, Brillon was without counsel.

On April 21, Brillon filed a pro se motion to dismiss for lack of a prima facie case. *Id.* 119-23. On May 7 he filed a pro se motion to dismiss in the interest of justice, based in part on speedy trial right violations. *Id.* 124-35.

On May 13, the Judge ordered a hearing on Brillon's motions for July 21. *Id.* 28.

May passed without a recorded cancellation of the scheduled jury draw. *Id.* 27-28.

On June 20, Lora Evans of the DG's Office wrote to the court clerk advising that "[w]e have received authorization and funding from the legislature" for a new "serious felony unit" and that Attorney Kathleen Moore would be hired for that position on August 1, 2003, after which she would be able to accept assignment to the case. *Id.* 159-60.

The docket records no activity in June. *Id.* 28

On July 21, the scheduled motion hearing was continued until August 11. *Id.* No other activity took place in July. *Id.*

H. August 4, 2003 to June 14, 2004.

On August 1, Moore was assigned by the Court. *Id.*

On August 11, Moore appeared at a status conference but said nothing. Aug. 11, 2003 Tr. Judge Suntag ordered another status conference in 30 days, in order to allow Moore and Brillon time to talk and Moore "a chance to come up-to-speed." *Id.* 2, 4, 6. Brillon objected to the delay. *Id.* 5-6.

At the status conference on September 8, Moore noted her need to make sense of the file and to track down depositions and other documents. She asked the prosecutor to provide her a list of the State's witnesses, with addresses, so she could interview them. Sept. 8, 2003 Tr. 10-11.

At the judge's suggestion, counsel agreed that whatever motions had been filed by predecessor counsel would be deemed withdrawn. *Id.* 13-14. The judge asked Moore to suggest a motions deadline. Moore replied that it depended in part on when she received the witness list and deposition transcripts. *Id.* 14-16.

The order was:

> All pending defense motions are withdrawn. State and defense advise Court by 11-7-03 as to which motions remain active.

J.A. 29. Responses to the new or refiled motions were due by November 21, 2003. "Everything filed is withdrawn and you have 60 days to file anything." Sept. 8, 2003 Tr. 15-16.

The next status conference was initially scheduled for November 17. J.A. 29.

On October 27 the November 17 status conference was advanced to November 3. *Id.*

On October 28 the November 3 status conference was rescheduled for December 8. *Id.* 29-30.

On November 3, Moore filed a request to extend the motions deadline until December 8, noting that the November 17 status conference had been continued "due to the unavailability of the Court" on that date. *Id.* 138. She represented that she still had not received deposition transcripts from predecessor counsel, and that Ammons was unavailable for consultation, having been on extended leave. The prosecutor agreed to the extension and Judge Suntag granted it the same day. *Id.* 30, 138.

The date "December 8, 2003" appears on the docket sheet with no accompanying notation. *Id.* 31. According to Moore, an off-record hearing was held that day, at which Moore stated that she had not received needed discovery from the state. She asked for and was granted another 60-day extension of the motion-filing deadline, and met with the prosecutor about needed discovery that same day. P.C. 95; J.A. 31.

On February 9, 2004, the State produced the last of outstanding discovery, with the exception of some photographs. P.C. 95.

On February 11, Moore moved for a third extension, also stipulated, representing that additional time was needed to complete the motions. *Id.*

On February 23, Moore filed a motion to dismiss for denial of a speedy trial and due process, and in the interests of justice.[7] *Id.* 96. The motion was denied by Judge Suntag in a written opinion dated April 19, 2004. Pet. App. 75.

On April 26, Moore filed a motion to compel production of the witness list, representing that the court had so ordered on December 8, 2003. J.A. 33-34, P.C. 124-25. In a separate motion she moved to compel production of the transcript and tape of a deposition which the State had taken of defense witness Roger Phillips in February 2002. J.A. 33.

June 14, 2004 Trial Date. At a hearing the same day the judge noted that "obviously" the witness list should have been provided in 2001. Apr. 26, 2004 Tr. 8. The court ordered the State to provide an updated witness list, and to notify the defense whether it had a tape or transcript of the Phillips deposition. (By the time of trial the transcript had been given to Moore. June 17, 2004 Tr. 5, 7-9.)

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[7] The docket entries mistakenly refer to this as a motion in limine. J.A. 31.

The defense asked for a trial date. The court ordered the case to be ready on June 14. J.A. 33.

On May 26, 2004, Moore filed a number of motions and other documents under Vermont's criminal procedure rules, including an opposition to the State's notice of intent to introduce evidence of a prior conviction, an opposition to the State's notice of intent to prove that Brillon had slashed the tires on Michelle's car, and a response to the State's motion to prevent the defense from questioning Michelle about drug use. The Court ruled on these matters on June 14.

On June 14, a jury was drawn. The trial began on June 15 and ended on June 17. Brillon was found guilty. *Id.* 38-39.

On March 23, 2005, Judge Suntag sentenced Brillon to 12-20 years. *Id.* 54.

I. The Appeal.

Brillon appealed to the Vermont Supreme Court, arguing that he had been denied his right to a speedy trial as guaranteed by ch. I, art. 10 and ch. II, § 28 of the Vermont Constitution, and by the sixth and fourteenth amendments to the United States Constitution. In particular, Brillon argued that the delays caused by a breakdown in the state's assignment-of-counsel system should be weighed against the state. In its brief, Vermont conceded that "the delay not attributable to the defendant, or to reasonable attorney preparation or court scheduling, extends from November 27, 200[2]

through July 31, 200[3], a period of eight months." J.A. 79.

The Vermont Supreme Court vacated the convictions and dismissed the charges. It held that, "[w]hen, as in this case, a defendant presses for, but is denied, a speedy trial because of the inaction of assigned counsel or a breakdown in the public defender system, the failure of the system to provide the defendant a constitutionally guaranteed speedy trial is attributable to the prosecution, and not defendant." Pet. App. 5. The Court based its conclusions on "the undisputed record in this case," which "includes the entire procedural history of this case – including the trial court's actions, the statements of withdrawing counsel, the periods of time defendant was without counsel, the period of time it took to bring defendant to trial, and the actions of the state's attorney and defendant." *Id.* 6-7. "The record reveals . . . that an unacceptable amount of the delay was not attributable to defendant, but to the system." *Id.* 7.

The Court reviewed the record in detail. It concluded that the first year of the delay, from July 2001 to June 2002, should not count against the State for various reasons, notwithstanding that Ammons withdrew because he was unready, and Altieri "did very little to move defendant's case forward during the several months he represented defendant . . . ." *Id.* 25. However, "most of the remaining two years can be and should be" weighed against the state. In this regard, the court noted the State's concession that the period between November

2002 and July 2003 – from Donaldson's withdrawal until Moore's assignment – should not count against Brillon. *Id.* 26.

The Court "recognize[d] that defendants may attempt to manipulate the system by creating delay that could conceivably support later speedy-trial claims," but found that "the record does not support the State's suggestion that this occurred here, and the district court made no such finding." *Id.* Indeed, the Court concluded from the record that Brillon's case was otherwise:

> [D]efendant's trial was delayed for several months, even years, because of the failure of several assigned counsel to do anything to move his case forward. As discussed above, defendant consistently requested that he be tried promptly. He sought the removal of his attorneys only after a significant period of time passed without them doing anything in his case.

Id. 29.

SUMMARY OF ARGUMENT

I. The Vermont Supreme Court correctly held that the pretrial delays caused by the failure in Vermont's assignment-of-counsel system should not be considered the defendant's responsibility under *Barker v. Wingo*, 407 U.S. 514 (1972). Because the state bears primary responsibility for assuring speedy trials, pretrial delays caused by the state's failure to provide constitutionally-required legal representation should be counted on the state's clock

under *Barker*, like other administrative failures, such as court congestion, understaffed prosecution offices, and negligence.

Vermont's failure to provide representation includes periods of only "pro forma" representation. Two lengthy delays in this case stemmed from the assignment of counsel who were inactive and did nothing to move the case to trial, whom the state and the court released from their duty of representation for contractual reasons. The Vermont court correctly attributed these delays to a failure of the DG's office and held the State responsible for them.

Indeed, Vermont conceded in the Vermont Supreme Court that two periods of non-representation and one period of pro forma representation in this case should be counted against the State. It should not be permitted to argue otherwise in this Court.

The decision below does not, as Vermont and its *amici* assert, convert public defenders into "government actors," and count their strategic delays against the state. The "government actor" in this case is not the lawyer in his representational capacity, but the agency responsible for assigning counsel in its administrative capacity. Respondent does not dispute that a state-assigned attorney's decisions regarding scheduling generally bind the client. Further, nothing in the opinion below suggests that continuances requested by assigned counsel should be counted against the state, as neither of Brillon's pro forma attorneys ever requested a continuance that affected the trial date.

Nothing in the opinion augurs an absurd double standard for assigned and retained counsel regarding continuances.

Moreover, Vermont's argument that Brillon would have been tried in February 2002 "but for" Ammons' withdrawal, and he is therefore "responsible" for the ensuing delays, misstates the law. This Court assigns responsibility under *Barker* by examining each period of pretrial delay and assessing its causes.

II. Delays caused by court congestion and negligence combined and overlapped with delays caused by the absence of legal representation. Trial was continued from February 2002 until September or October 2002, in part due to the press of other cases. Trial was not held in October, when Brillon was still nominally represented by Donaldson, for reasons that do not appear in the record. Another scheduled trial date in May 2003 also passed without comment in the docket. Attributing these delays to the State is a routine application of *Barker*.

III. Prosecutorial inaction and dilatory discovery after November 2002 extended the overall delay. The prosecutor had an independent duty to move the case forward but he took no action to do so despite being on notice of Brillon's lack of legal representation. In the later phases of the case, his months-long failure to provide defense counsel with discovery and a witness list necessitated further continuances, including two by consent.

IV. The Vermont court's weighing of the four *Barker* factors was based on the record facts and

properly informed by the court's institutional knowledge and legal responsibilities regarding Vermont's criminal court system. Its attribution of responsibility for the periods of delay was correct and its balancing was reasonable and entitled to deference.

ARGUMENT

I. PRETRIAL DELAYS CAUSED BY A FAILURE IN STATE'S ASSIGNMENT-OF COUNSEL-SYSTEM SHOULD NOT BE CONSIDERED THE DEFENDANT'S RESPONSIBILITY UNDER *BARKER V. WINGO*.

From June 2002 to August 2003, Brillon had no representation in any real or substantial sense, owing to a failure of the state's assignment-of-counsel systems. These delays, like other systemic delays, should be attributed to the State.

A. Delays Caused by a Breakdown in the State's Assignment-of-Counsel System, Like Delays Caused by Court Congestion and Negligence, Should Be Weighed Against the State.

1. The speedy trial rule announced in *Barker* "places the primary burden on the courts and the prosecutors to assure that cases are brought to trial." *Barker v. Wingo*, 407 U.S. 514, 529 (1972). "A defendant has no duty to bring himself to trial; the State has that duty . . . ." *Id.* at 527 (footnotes omitted). Practically speaking, a defendant also has no independent *ability* to bring himself to trial, because courts control their own calendars. ABA

Standards for Criminal Justice Standard 12-4.5 (3d ed. 2006).

Accordingly, the *Barker* Court held, delays caused by institutional failings, "such as negligence or overcrowded courts[,]" should be counted against the state, "since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." 407 U.S. at 531. The same is true, the Court added in *Strunk v. United States*, 412 U.S. 434 (1973), of delays caused by a prosecutor's office that "was understaffed due to insufficient appropriations and, consequently, was unable to provide an organization capable of dealing with the rising caseload . . . ." *Id.* at 436 (citing *Barker*, 407 U.S. at 531). As Justice White put it in his concurring opinion in *Barker*, "unreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal-justice system are limited and that each case must await its turn." 407 U.S. at 538 (White, J., concurring).

2. It is axiomatic that the state is responsible for providing counsel for indigent defendants. *Barker*'s "duty of insuring that the trial is consistent with due process[,]" 407 U.S. at 527, includes the provision of legal representation. *Gideon v. Wainwright*, 372 U.S. 335 (1963), recognized the "obvious truth" that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344.

Vermont exercises its duty under *Gideon* through a state-wide system of public defenders and assigned counsel, which operates in tandem with the state's courts. The substantive right of representation is guaranteed by statute.[8] The practical job of providing counsel is entrusted to a "defender general" with "the primary responsibility for providing needy persons with legal services" through state-employed public defenders, or private attorneys with whom the DG contracts. Vt. Stat. Ann. tit. 13, § 5253(a), (b).

The Vermont Supreme Court has imposed a parallel responsibility on trial court judges

> to assure the availability of counsel to all persons adjudged in need thereof, confronted by proceedings which may involve potential loss of personal liberty . . . .

Vt. Admin. Order No. 4, § 1. The court must notify the public defender "[i]n all cases where the right of a needy person to be represented by counsel exists, and is not waived . . . ." *Id.* § 3. It must assign other counsel when "the public defender is unable, due to a conflict of interest or otherwise, to represent the person in question" or where "the court, for good cause, determines the need for a replacement attorney in lieu of the public defender." *Id.* But the court's choice of "other counsel" is limited. The assignment must go to an attorney or firm under contract with the DG to provide assigned counsel

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[8] *See* Vt. Stat. Ann. tit. 13, §§ 5201(4), 5231; Vt. R. Crim. P. 44(a).

services, unless a conflict or other good cause requires a replacement, "in which case the court shall assign alternate counsel." *Id.*

3. A failure to provide legal representation which has the effect of delaying trial is the state's responsibility, not the defendant's. The conclusion has the force of syllogism. *Barker*, *Strunk* and *Doggett v. United States*, 505 U.S. 647, 657 (1992), charge the state with systemic and "negligent" delays, because they are the state's responsibility. *Gideon* and *Powell v. Alabama*, 287 U.S. 45 (1932), charge the state with a duty to provide legal representation for criminal defendants, and Vermont law closely involves the courts themselves in seeing that duty discharged. As the Vermont Supreme Court wrote in this case:

> The defender general's office is part of the criminal justice system, and ultimately it is the court's responsibility to assure that that system prosecutes defendants in a timely manner that comports with constitutional mandates.

Pet. App. 28.

This conclusion finds support in *Barker* itself, whose balancing test was intended to

> permit . . . a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or

> from *a situation in which no counsel has been appointed.*

407 U.S. at 529 (emphasis added). The Solicitor General does not dispute the point. Amicus Br. of United States 27-28. If the Court's speedy-trial and right-to-counsel precedents are to coexist, no other conclusion is possible.

The violation is clearest when pretrial time passes with no assignment of counsel, as during the two months from November 26, 2002 when Paul Donaldson withdrew, to January 23, 2003 when David Sleigh was notified of his assignment, and the four months from April 11, 2003 after Sleigh filed his "notice of withdrawal" until August 11, 2003, when Kathleen Moore made her first appearance. These six months of the delay cannot fairly be charged to the defendant.

4. The failure to provide legal representation also extends to the time periods when Brillon was only nominally represented by two attorneys, Donaldson and Sleigh.

a. Legal representation means more than a lawyer's name on a case. There is no constitutionally significant difference between a failure to assign counsel and assignment of nominal or pro forma counsel. The Court recognized this in *Powell v. Alabama*, where counsel were informally "appointed" but the record compelled "the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going

investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense . . . ." 287 U.S. at 57. Rather, "the appearance was rather pro forma than zealous and active . . . ." *Id.* at 58 (quotation omitted). "Under the circumstances disclosed," the Court wrote, "we hold that defendants were not accorded the right of counsel in any substantial sense." *Id.* The Court has not changed its opinion of pro forma counsel over the years. In *Evitts v. Lucey*, 469 U.S. 387, 396 (1985), the Court wrote that "nominal representation on an appeal as of right – like nominal representation at trial – does not suffice to render the proceedings constitutionally adequate." Indeed, nominal, non-functional counsel is no better than "no counsel at all." *Id.*

b. The periods when Brillon was represented by Donaldson and Sleigh should be attributed to the State because they are no different from the times when he had no lawyer all. There are two aspects to this equivalency. First, Donaldson's and Sleigh's activity – or, rather, inactivity – was essentially the same as "no counsel at all." Second, their inactivity, like the non-assignment of counsel, was not simply a failure of performance by the lawyers themselves, but was the result of decisions made and actions taken by the state's system for providing legal representation.

These attorneys' inactivity is not in dispute. The record shows missed deadlines, the absence of any filings or requests (other than requests for extensions), and withdrawal. The Vermont Supreme

Court found that Sleigh did "nothing" and Donaldson did "little or nothing." Pet. App. 27. The dissent agreed. *Id.* 45.

Equally important, their inactivity was the result of an external factor, a failing in the state's machinery for appointing counsel. This failure is an "external" factor in the same sense in which this Court has used that concept as part of the "cause" analysis in the law of procedural default:

> the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.

Murray v. Carrier, 477 U.S. 478, 488 (1986).[9] This concept is analogous here because the second *Barker* factor serves a function much like that of the "cause" exception to the procedural default rule in federal habeas corpus practice – to determine whether the state or the defendant should bear the consequences when proceedings in a defendant's case have gone awry because of an attorney's actions or failures to act.

Here, the "external factor" that hampered Donaldson's and Sleigh's representation was Vermont's Office of the Defender General, in the exercise of its powers to appoint and replace counsel.

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[9] The Solicitor General has suggested the same analogy, arguing that "the [defendant] must 'bear the risk of attorney error.'" Amicus Br. of United States 21 (quoting *Murray*, 477 U.S. at 488)).

c. As authorized by statute,[10] the DG assigns "contract" counsel in cases that public defenders cannot handle because of conflicts. When this case was pending in the district court, this contract system was a matter of concern in the Vermont Legislature. In 2000, the legislature established an "indigent defense task force" to study "the structure and funding of the office of the defender general and ways to improve services to clients."[11] The task force's report, dated January, 2001, found significant shortcomings, but singled out contract lawyers as its main concern.

> The most troubling aspect of the assigned counsel contract conflict system is its current crisis-level inability to recruit and retain contractors throughout the state. About one-third of the assigned counsel contractors refuse to renew their contracts for the next year . . . The failure to recruit and retain attorneys in the state's contract program stems from a combination of inadequate compensation, uncontrolled caseloads, lack of supervision and support, and insufficient funding for investigative and other related support services.

Report of the Indigent Defense Task Force ("Report") 8-9 (2001).[12] Witnesses who testified before the task

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[10] Vt. Stat. Ann. tit. 13, §§ 5205, 5253(b).

[11] Act. No. 152 of the Acts of the 1999-2000 Session, § 56b.

[12] Counsel is requesting to lodge a copy of the report pursuant to Rule 32.3.

force "consistently identified the Assigned Counsel program as the 'weak link' in the present indigent defense delivery system." They stressed "[t]he frequent turnover of assigned counsel contractors because of lack of adequate compensation and benefits," and the assignment of "[i]nexperienced attorneys [who] are often required to handle complex and serious criminal cases beyond their capabilities." *Id.* at 9. The task force's first recommendation was the creation of "three regional serious crimes units" to handle cases where the public defender had a conflict of interest. *Id.* at 21.

In June 2001 the legislature authorized three two-person assigned counsel "serious felony" units for fiscal year 2002,[13] and in May 2002 it appropriated $81,667 for the three units.[14] On June 20, 2003, the DG's business manager reported to the Bennington court clerk that the legislature had authorized a fourth serious felony unit for fiscal year 2004. J.A. 159.

Once counsel has been assigned to a case, the DG has authority to replace counsel for "good cause," independently of the court. Vt. Stat. Ann. tit. 13, § 5274. This statutory grant is acknowledged in the Vermont Supreme Court's Administrative Order No. 4, which also gives the courts a corresponding power to replace counsel independently of the DG. Once

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[13] Act No. 63 (H. 485) of the Acts of the 2001-2002 Session, § 57(a) (approved June 16, 2001).

[14] Act No. 110 (H. 646) of the Acts of the 2001-2002 Session, § 33(a)(29) (effective May 23, 2002).

counsel is assigned, "the responsibility for the representation shall continue until . . . the attorney is relieved by (i) the Defender General, [*or*] (ii) the trial court making the appointment . . . ." *Id.* § 4(b)(i). Although Vermont Rule of Criminal Procedure 44.2(c) appears to provide otherwise – permitting withdrawals after a status conference only "for good cause shown and on such terms as the court may order" – in the present case the statute and the administrative order were allowed to trump the rule. Donaldson and Sleigh were both allowed off the case on the basis of their contractual status with the DG.

d. The DG assigned Donaldson to this life-imprisonment case knowing that Donaldson's contract would expire in three weeks. The contract was not renewed. The DG told Donaldson it would find a replacement. Donaldson and the DG discussed the matter for months, and eventually the DG found a replacement – an attorney who was about to give birth and would be unavailable for a time. When the court ratified Donaldson's departure, on contract grounds the DG nominated David Sleigh, a contract attorney in St. Johnsbury. The DG then failed to get Sleigh the necessary paperwork or formally assign him for two months. Soon after Sleigh had entered an appearance the DG modified its contract with him, relieving Sleigh of responsibility for Brillon's case, whereupon Sleigh also withdrew. The DG then allowed another four months to pass, with no attorney's name on the docket, before the new serious felony unit started operations and Brillon could be represented by

Moore. *See* J.A. 232-34, 238-40 (Donaldson); *id.* 24-26, 84-85, 118, 158, 243-45, 249-53 (Sleigh).

The Vermont Court properly held that the DG's office was a material "external" factor in Donaldson's and Sleigh's inactivity and the delays that inactivity consumed.

5. The State repeatedly asserts that the Vermont Supreme Court's decision was unprecedented. *See, e.g.*, Pet'r Br. 1 ("what appears to be a first in the history of American jurisprudence"); *id.* at 39 ("crossing a line no other court has dared to cross"). These assertions are unfounded. Decisions finding speedy trial violations where delays occurred because no representation or only nominal representation was provided to a defendant are commonplace.

In *Glover v. State*, 817 S.W.2d 409 (Ark. 1991), for example, defense counsel was granted permission to withdraw when he discovered a conflict of interest, leaving the defendant without counsel for two months until a new attorney was assigned. The prosecution argued that the counsel-less period should not count against the state for speedy trial purposes because Glover was free to proceed pro se. The Arkansas Supreme Court disagreed: "The effect of adopting such a position would be to force defendants to choose between their constitutional right to be represented by counsel and their constitutional right to have a speedy trial. . . . We refuse to adopt such a position." *Id.* at 410. Similarly, the defendant in *State v. Stock*, 147 P.3d 885 (N.M. Ct. App. 2006), remained in custody for three and one-half years, in part because his public

defenders, who were carrying a "humanly impossible" caseload of 200-300 cases, did essentially nothing to move the case forward during certain periods. *Id.* at 888. The court refused to weigh this time against the defendant. *Id.* at 891.

In *Isaac v. Perrin*, 659 F.2d 279 (1st Cir. 1981), there was again a delay between the withdrawal of the defendant's public defender and the assignment of new counsel. The First Circuit refused to charge this period to the defendant, considering it "similar to those caused by overcrowded courts," "which count[] against the state, but less heavily than intentional delay." *Id.* at 282-83. The same result followed in *Henderson v. State*, 662 S.E.2d 652 (Ga. Ct. App. 2008), where delays occurred because of a series of problems with the defendant's attorneys. (One attorney "never filed an appearance," others "needed time to prepare" for trial, and there was later "confusion as to who represented" defendant.) *Id.* at 654. The court held that "part of the delay may be attributed to the State's negligence" and that "this factor must be weighed as a relatively benign consideration against the State." *Id.* (internal quotation marks and alterations omitted); s*ee also United States v. Denson*, 668 F. Supp. 1531, 1533 & n.6 (S.D. Fla. 1987), *aff'd*, 859 F.2d 925 (11th Cir. 1988) (unpublished table decision); *People v. Johnson*, 606 P.2d 738, 747 (Cal. 1980).

Courts have also frequently found constitutional violations in cases of long-delayed appeals. Although *Barker*'s Sixth Amendment rule applies to trials, courts have held that its four-factor analysis

"provides an appropriate framework for evaluating whether a defendant's due process right to a timely direct criminal appeal has been violated." *Harris v. Champion*, 15 F.3d 1538, 1559 (10th Cir. 1994); *accord United States v. Thomas*, 167 F.3d 299, 303 (6th Cir. 1999); *United States v. Abou-Kassem*, 78 F.3d 161, 167 (5th Cir. 1996); *United States v. Rothrock*, 20 F.3d 709, 711-12 (7th Cir. 1994).

The Tenth Circuit ruled in *Harris* that lengthy delays in perfecting an appeal, caused by the public defender's backlog, should be attributed to the state, not the defendant.

> The State has offered no constitutionally sufficient justification for the delays, such as that the cases are unusually complex or that they involve the death penalty. The only reasons offered by the State were the lack of funding and, possibly, the mismanagement of resources by the Public Defender. Neither of these reasons constitutes an acceptable excuse for delay.

15 F.3d at 1562 (internal citation and footnote omitted); *see also Simmons v. Beyer*, 44 F.3d 1160, 1170 (3d Cir. 1995); *Muwwakkil v. Hoke*, 968 F.2d 284 (2d Cir. 1992); *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990); *Collins v. Rivera*, No. 99-CV-0490H, 1999 WL 1390244, at *4 (W.D.N.Y. Dec. 2, 1999); *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006); *Gaines v. Manson*, 481 A.2d 1084, 1092-93 (Conn. 1984).

In addition to ignoring the significant precedent that undercuts its position, the State cites decisions

that have nothing to do with the facts of this case. *See* Pet'r Br. 30-34. These citations all relate to delays produced by the defendant himself or by dilatory actions by defense counsel. As the Solicitor General correctly argues, Amicus Br. of United States 15-23, it is logical that such delays should be attributed to the defendant. But it is also logical that delays resulting from the absence of counsel and from the assignment of nominal, non-functional counsel should be considered the state's responsibility. Not one of Vermont's cases is to the contrary.

B. Vermont Has Waived Its Argument That the Periods of Non-Representation and Nominal Representation from November 2002 to August 2003 Should Be Charged to the Defense.

Vermont's argument in this Court that all pretrial delays were Brillon's responsibility is an abrupt about-face from the position it took in the Vermont Supreme Court. Vermont's brief to that court acknowledged that the eight months between November 2002 and July 2003 – the period of Sleigh's tenure and the uncounselled periods on either side – "can not be attributed to the defendant . . . ." J.A. 78 (citing *Barker*, 407 U.S. at 531); *id.* 79. The Vermont court noted this concession, Pet. App. 26, while also counting the preceding months of Donaldson's tenure as a time when the defendant lacked representation in any real or substantial sense. Vermont's new claim constitutes sandbagging.

This Court has adamantly refused to consider contentions not raised in state courts on basic comity grounds and "a proper respect for state functions . . . ." *Webb v. Webb*, 451 U.S. 493, 499 (1981) (internal quotation marks omitted); *see Howell v. Mississippi*, 543 U.S. 440 (2005); *Cardinale v. Louisiana,* 394 U.S. 437 (1969). Vermont's argument to the Vermont Supreme Court led that court to decide Brillon's speedy trial claim on the premise that the eight months from November 2002 through July 2003 were not in contention. Based on that premise the Vermont court was not called upon to further justify counting those eight months against the State, or counting any similar period of pro forma representation (*e.g.*, Donaldson's tenure) against the State on the same basis.

Vermont now asks this Court to reverse the Vermont Supreme Court for having failed to justify a conclusion that Vermont told the court was not controversial. That tactic, if allowed here, would deprive the state court of its opportunity and responsibility to do the job that the federal system expects it to do in the first instance: interpret federal constitutional commands in the context of the specific controversy between the parties, the record, and relevant state law and practice. *See, e.g.*, *O'Sullivan v. Boerkel*, 526 U.S. 838, 844-845 (1999). This Court should not allow any party to do that to a state court. *See Illinois v. Gates*, 462 U.S. 213, 221 (1983).

C. The Decision below Does Not Convert Public Defenders into "State Actors," Invite Abuse, Or Create a Double Standard for Indigent Defendants' Counsel.

The parade of horribles suggested by Vermont and its *amici* – that the decision below converts public defenders into "government actors," that it encourages them to create strategic delays, and that counsel for indigent defendants will be held to a different standard than retained counsel – are baseless. These arguments are aimed at a straw man. The critical fourteen-month period of delay here is attributable to the DG and the court. Not a single trial continuance was requested by defense counsel during this period.

1. Vermont and its *amici* misread the Vermont court's decision as holding that public defenders and assigned counsel, because their services are paid for by the state, are "government actors," and that their conduct which delays a case *ipso facto* counts against the state for speedy trial purposes. *E.g.*, Amicus Br. of United States 24-26. From this misreading they spin out consequences that no reasonable court could tolerate – a regime in which defense continuances count against the state's speedy trial clock, unless the lawyer has been retained, in which case the time counts against the defense. The Vermont Supreme Court made no such holding.

The Vermont court held that *the DG's office*, the agency charged by state law with assigning and relieving counsel, was a "state actor," which must be held responsible for its part in the delays. There is a

clear distinction between the role of administrative actors such as the DG's office and the role of individual defense attorneys. Incontestably, public defenders represent their clients, not the state, and their representation of clients is not "state action." *Polk County v. Dodson*, 454 U.S. 312 (1981). This case, by contrast, concerns the non-assignment and nominal assignment of counsel by the state court and/or the responsible state agency, administrative actions that are ancillary to, and have essentially nothing to do with, attorney-client relationships or the actions of counsel as an advocate for his client. This Court in *Polk County* stressed this very difference "between administrative functions . . . and a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." 454 U.S. at 322 n.13. Conflating the two, as Vermont and its *amici* have done, "ignores the basic distinction that in the latter capacity a public defender is not acting on behalf of the State; he is the State's adversary." *Id.*

The Court's recent decision in *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008), illustrates the proposition that the state's duty to provide representation for indigent defendants, and a lawyer's duty to provide effective representation, are horses of a different color. *Rothgery*, like *Polk County*, was a § 1983 action, in which a defendant claimed that the county violated his sixth amendment rights by refusing to *assign* him counsel after his initial court appearance. Neither the parties nor the Court questioned that the non-assignment was action (or inaction) "under color of state law."

The Vermont court never suggested that a lawyer acting as a public defender is an "arm of the state." Amicus Br. of Utah et al. 9. Rather, the court held that "the defender general's office is part of the criminal justice system and an arm of the state." Pet. App. 5. Vermont's statutes charge the DG with the responsibility for providing counsel. Vt. Stat. Ann. tit. 13, § 5253(a). In discharging this function the DG acts on behalf of the State; he is not the State's adversary. *Cf. Polk County*, 454 U.S. at 322 n.13.

2. Like Vermont's other *amici*, the Solicitor General focuses on counsel and their professional responsibilities, arguing that "the decisions of counsel are generally binding on the defendant." Amicus Br. of United States 21. As a general rule, and with the exception of cases where counsel renders "ineffective assistance," "when counsel seeks a delay, that delay is attributable to the defendant." *Id.* 23 (citing *New York v. Hill*, 528 U.S. 110, 115 (2000), and other cases where defense counsel sought or agreed to a continuance).

The Solicitor General's general rule has no application to this case. Although a lawyer's continuance motion generally speaks for and binds the client, neither Donaldson nor Sleigh made any "requests for delays" which postponed the trial date, with the possible exception of one month in 2002. Rather, the delays were the result of their inaction and subsequent withdrawals. Doing nothing is not a "decision," nor is it the same as "seeking" delay for litigation purposes. In the face of a client's demands

for a speedy trial, it is certainly not binding on the client.

The Solicitor General's caveat for "ineffective" lawyers raises problems that the Court need not decide in this case. Ineffective assistance, by definition, includes an element of prejudice, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). This is necessarily an outcome-dependent retrospective test. By what standard should mid-course ineffectiveness be evaluated, when the outcome is still in the future? As a practical matter, how would a trial judge make a determination of the facts? What role would the prosecutor play? The Court found it unnecessary to enter this uncharted territory in *Rothgery*. 128 S. Ct. at 2592. It also need not do so here.

The rule we propose is narrower and more workable. The pretrial time taken up by an assigned lawyer who enters a case and then exits it, without having represented his client in any real or substantial sense, is chargeable to the state under *Barker*, to the extent that these delays are the product of external state influences, like the DG's office here. That is sufficient to decide this case.

3. Vermont's related argument, that the opinion below creates an incentive for strategic delay and establishes a double standard for continuances sought by assigned and retained counsel, rests on the same misreading of the court's holding and the record. Vermont paints a dire and fantastic picture.

If the decision below is upheld, "only delays by private counsel get charged against the defendant . . . ." Pet'r Br. 36. This absurdity even extends to intentional delays. *Id.* 37-38.

The Vermont Supreme Court made no such holding, as explained above. The argument that it did – that it believed publicly funded lawyers were "government actors" whose requests for continuances were government requests, chargeable to the state – is the absurd endpoint of fanciful extrapolation from a false premise.

Vermont's brief not only misconstrues the holding below; it ignores the record. *None* of the trial delays during the fourteen months from June 2002 to August 2003 were the result of a continuance. In August 2002 the judge asked Donaldson how much time he needed to be ready. Donaldson asked for two months, and the judge put the case on the jury list for October 2002. But a previous scheduling decision during Altieri's tenure had slated the trial for September 2002 at the earliest, so Donaldson's request extended the pretrial time for a month at most – or rather it would have, if the October jury draw had not been cancelled. Given that unexplained cancellation (discussed in Point II, *infra*), and Donaldson's withdrawal from the case in late November, even this putative month had no effect on the trial date.

After Sleigh was assigned in January 2003, the judge scheduled a new trial date for "late May" 2003. Sleigh asked for an extension of motion and discovery deadlines, but *not* a continuance of the

trial. Rather, he withdrew from the case in April. And there can be no claim that defense-requested continuances had anything to do with the total of six months before and after Sleigh, because nobody was there to ask for one.

The only continuances that the Vermont Supreme Court arguably counted on the State's clock came at the end of the pretrial period, when Brillon had already been waiting for trial for more than two years. "Despite the already significant delay," the court wrote, "the prosecution stipulated to several more continuances before a trial was finally held in June 2004." Pet. App. 27. But nothing suggests that the court's disapproval stemmed from Brillon's attorney's court-assigned status, or that the court would have taken a different view had she been retained. Instead, the court pointed to the already-accumulated delay and the prosecutor's acquiescence in further delay. In Point III, *infra*, we argue that these late continuances were also the product of the prosecution's dilatory discovery.

Nothing in the decision below gives assigned counsel an incentive to delay. Vermont's further claim that the decision gives the *defender general* a motive to delay cases verges on the ridiculous. Vermont's assignment-of-counsel agency, the State argues, "has every incentive to win the freedom of the defendants who are represented." Pet'r Br. 33. Defendants represented by assigned counsel should not "walk away unpunished because of delays caused by the Defender General, when the Defender General is trying to obtain that very result," and the DG "will

now have every motive to delay assigning counsel." Pet'r Br. 33-34. However, the DG has responsibility for providing counsel, not acting as counsel. Vt. Stat. Ann. tit. 13, § 5253(a). It is not the State's adversary. The notion that it would intentionally violate its duty in order to obtain that rarest of outcomes, a speedy trial dismissal, is frivolous.

D. Vermont's Claim That Brillon Was "Gaming" the System, Wanted Delay, and "Fired" His Lawyers As a Means to That End, Misrepresents the Record and Disregards the Vermont Court's Contrary Findings.

Vermont's insistence, seconded by *amicus* Vermont Network Against Domestic and Sexual Violence et al. ("VNADASV"), that Brillon secretly wanted delay and achieved it by "firing" his lawyers, is no less fantastical for its repetition. Vermont ignores the utter lack of record support for this devil-theory of the case, which, as explained in the statement of the case, *supra* 3-6, flies in the face of the Vermont Supreme Court's record-based findings. While the Vermont court held Brillon responsible for early delays caused by the withdrawal of Ammons and Altieri, nothing supports a finding that he secretly wanted these delays.

Ammons. Brillon by telephone heard Ammons plead for a continuance on the eve of Brillon's scheduled trial. Brillon heard Ammons tell the court that his office was in disarray, that he was carrying an impossible caseload, and that he was unprepared for trial. Attorneys in such straits, whose "continued representation in previously accepted cases will lead

to the furnishing of representation lacking in quality or to the breach of professional obligations," must "take such steps as may be appropriate to reduce their pending or projected caseloads . . . ." ABA Standards for Criminal Justice: Providing Defense Services Standard 5-5.3 (3d ed. 1992). Even Vermont's *amici* concede as much. Amicus Br. of Utah et al. 7; Amicus Br. of NAG et al. 12 n.8.

However, the issue is not whether Ammons had a right or duty to withdraw, but whether he had an ulterior motive for doing so: to delay the trial so that Brillon's case would be reassigned to a different judge, Pet'r Br. 10-12, or to torment Michelle, by dragging out the proceedings. Amicus Br. of VNADASV 7, 13, 18, 24. The Vermont Supreme Court, taking care to specify its authority to review the record *de novo*, Pet. App. 11-12, concluded that Ammons withdrew "because of [his] failure to be ready for trial, not because of defendant's actions." *Id.* 25. Brillon grudgingly consented, because it was apparent that Ammons, by admission, was "not prepared to go forward with a trial." *Id.* 30. These findings, on this record, are entitled to deference. *Cf. Doggett*, 505 U.S. at 652-54 (declining to revisit findings of primary fact by trial and appellate courts regarding government's negligence and defendant's ignorance of pending charge).

Altieri. Brillon's request for a replacement for Ammons was reasonable, given what Ammons told the court about his unreadiness. His angry threat to Altieri was not, and though Vermont overplays the

incident,[15] we do not disagree that Brillon's misconduct forced Altieri's withdrawal. But the claim that his motive was to delay the trial is pure speculation, and his conduct, regardless of motivation, did not actually *produce* any delay. Donaldson was appointed the same day (June 11, 2002) and trial was not scheduled until September or October, because of court congestion.

The case stands in contrast with *Barker*, where the record did show that the defendant "did not want a speedy trial" because he was hoping for the acquittal of a codefendant. For more than three years "the record shows no action whatever . . . that could be construed as the assertion of the speedy trial right," 407 U.S. at 534, and Barker's counsel conceded that Barker did not want to be tried. Vermont's assertion that Brillon wanted delay is grounded in speculation, not the record.

Donaldson and Sleigh. Brillon asked for a replacement for Donaldson because Donaldson had done nothing to prepare the case. The court let Donaldson withdraw because his contract had expired. As for Sleigh, the firing went the other way: Sleigh fired Brillon. In both cases the court must share responsibility – for permitting Donaldson to withdraw, and acquiescing in Sleigh's withdrawal.

Brillon simply did not have *control* during this process. The *amicus* brief of VNADASV asserts that "the only person who seemed to be in control of the court proceedings during the first two years was

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[15] Brillon denied that he threatened Altieri's life.

Brillon himself." Amicus Br. of VNADASV 21. Vermont's brief assumes the same, with its claims that Brillon manipulated his lawyers and "fired" them when they would not do his bidding, all for the purpose of delay. *E.g.* Pet'r Br. 27. To the extent that these are factual assertions, the court below found them erroneous: "[T]he trial court, the state's attorney's office, and the defender general's office" were not merely "passive players helpless to prevent defendant's 'monkey-wrenching' 'maneuvers.'" Pet. App. 6 (quoting dissent, *id.* 39, 44). As a legal matter, Vermont and its *amici* are also wrong. Unlike the client of retained counsel, Brillon had no right to "fire" his lawyers. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). The decision to replace assigned counsel is in the discretion of the court, *Morris v. Slappy*, 461 U.S. 1 (1983), or, pursuant to Vermont's statutes and Administrative Order 4, the DG.

E. Vermont's "But For" Argument.

1. Finally, Vermont argues that *but for* Brillon's "firing" of Ammons, Brillon would have been tried within seven months of arraignment, so all the subsequent delays must be counted on Brillon's clock. Aside from the fact that Brillon acted reasonably in requesting a substitute, this Court's precedents give no support for Vermont's method of time-keeping.

For example, the Court wrote in *United States v. Loud Hawk*, 474 U.S. 302 (1986), that delay caused by the defendant's interlocutory appeal would not count against the government, unless the defendant

could show "an unreasonable delay caused by the prosecution in that appeal, or a wholly unjustifiable delay by the appellate court." *Id.* at 316. But these latter delays would not have happened "but for" the appeal. In *United States v. Taylor*, 487 U.S. 326 (1988), the defendant failed to appear at trial, and after his re-arrest months later a "lackadaisical" prosecution delayed his trial beyond the 70-day limit of the Speedy Trial Act, 18 U.S.C. § 3162. The Court acknowledged that the act had been violated, even though the violation would not have occurred "but for" the defendant's failure to appear.

Similarly here, even though Brillon can be held responsible for Ammons' withdrawal and for a reasonable period thereafter to allow a replacement attorney to come up to speed – periods which the Vermont Supreme Court *did* charge against Brillon – the trial court is nevertheless responsible for most of the ensuing seven- or eight-month continuance that the prosecutor explained was a result of court congestion (*see* Point II, *infra*). It is simply not the case that an initial delay caused by a defendant immunizes the prosecution against all subsequent delays for which it is responsible. Under *Barker*, the defendant's penalty for giving rise to a delay is only that this period is counted against him – not that all future state- or court-caused delays are forgiven.

2. A variant on this "but for" argument is Vermont's suggestion that by "firing" his lawyers Brillon exhausted the supply of lawyers, given the "paucity" of criminal lawyers in Vermont. Pet'r Br. 29. Vermont portrays the falling-off of lawyers in

this case as a "sabotage" for which Brillon stands responsible. It stresses that he had six lawyers in all. The correct number is *seven*: Wood, Ammons, Harnett, Altieri, Donaldson, Sleigh, and Moore. However, Brillon bears, or shares, responsibility for the withdrawals of only the first two, Ammons and Altieri.[16] Any depletion of the lawyer pool came after the withdrawals of Donaldson and Sleigh, for which Brillon bears no responsibility.

There may well have been a depleted supply of *contracted* lawyers at this time,[17] but it was not Brillon's doing. The 2001 Report of the Indigent Defense Task Force flagged the DG's "crisis-level inability to recruit and retain contractors." *Supra* 36. The conditions described in the report are mirrored in this record and account for the repeated dysfunctional assignments and long-delayed reassignments of counsel for Brillon. To the extent that these resulted from a shortage of contract lawyers, that problem was systemic, a failure of the state.[18]

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[16] Aside from Donaldson, Sleigh, and Moore, Wood appeared only for arraignment and Harnett withdrew after a day or two because of a conflict.

[17] Even if there were, nothing indicates that there were not plenty of lawyers who could be assigned under Administrative Order No. 4, §§ 3, 6(a).

[18] Delays like the two months when Brillon was wholly without counsel between the designation of Sleigh and the time when Sleigh was given notice of his assignment were the result of pure negligence, not any shortage of attorneys.

II. ADDITIONAL AND CONCURRENT DELAYS WERE CAUSED BY COURT CONGESTION AND NEGLIGENCE, DELAYS WHICH COMBINED WITH AND OVERLAPPED THOSE ASSOCIATED WITH THE ABSENCE OF LEGAL REPRESENTATION.

During the period from June 2002 to August 2003, aside from the delays caused by the breakdown in the court's assignment-of-counsel process, the trial date was independently delayed by scheduling decisions by the court clerk's office. Attributing these delays to the state is routine under *Barker*, 407 U.S. at 531.

February to November 2002. After Ammons withdrew, the date of trial was continued from February 25, 2002 until October 2002, seven months, because of "the backlog related to other cases and specifically other 60-day cases" and because Brillon "had the trial dates reserved and he did not use them." J.A. 221.

For a reason which the record does not explain, the court cancelled the October trial date a month before Donaldson was allowed to withdraw. The cancellation itself was not entered on the docket, and it is impossible to guess why, or by whom, it came about, but the trial never happened.

May to August 2003. No new date was set from November 2002 to February 19, 2003, a period which coincided with, but extended beyond, the first period of total non-representation. At an off-record status conference, the judge set the trial for late May 2003. Sleigh withdrew in early April. May 2003 passed

without any notation about cancellation or rescheduling of the trial date, after which Brillon was again without counsel until August 2003. The record for May 2003 is as blank as it is for October 2002, but the silent cancellation of the May draw coincides with the court's silent acquiescence in Sleigh's withdrawal. The delay from the cancelled May jury draw until Moore's assignment in August should be charged to the court.

In cases such as this, where the record does not explain an event, courts attribute the resulting delay to the state. *Barker* speaks of "delay which is presumptively prejudicial," 407 U.S. at 530, and it directs courts to consider "the reason the government assigns to justify the delay." *Id.* at 531. As Professor LaFave puts it:

> The reference to "the reason the government assigns" indicates that the burden is on the government . . . . And when the government simply offers no explanation at all, it has been held that the court "can presume neither a deliberate attempt to hamper the defense nor a valid reason for the delay."

5 Wayne R. Lafave, et al, *Criminal Procedure* § 8.2(c), at 122 & nn.28-31 (3d ed. 2007) (quoting *United States v. Mancino*, 486 F.2d 750, 753 (7th Cir. 1973)). *Accord Jackson v. Ray*, 390 F.3d 1254, 1262 (10th Cir. 2004); *United States v. Cardona*, 302 F.3d 494 (5th Cir. 2002).

III. PROSECUTORIAL INACTION AND DILATORY DISCOVERY AFTER NOVEMBER 2002 CONTRIBUTED TO AND EXTENDED THE OVERALL DELAY.

While in the early stages of the case the prosecutor pressed for an early trial, moving for a date in February and opposing Ammons' requests for a continuance and to withdraw, the prosecutor's behavior was passive and dilatory after Donaldson withdrew in November 2002. For the next year and a half the record shows only inaction, acquiescence, and negligent or deliberate obstruction by the prosecution.

When Donaldson's withdrawal left Brillon without counsel, the prosecutor took no action. When Sleigh peremptorily withdrew from the case the prosecutor made no objection, and nothing indicates any effort on his part to address Brillon's lack of representation before or after Sleigh's withdrawal. The prosecution shares with the court the "primary burden" to bring its accusation to trial, *Barker*, 407 U.S. at 529, and it did not lift a finger during this period.

After Moore's assignment in August, the prosecutor's discovery delays necessitated a string of continuances from September 2003 until late April 2004. At a status conference on September 8, the court set deadlines for pretrial motions. Moore noted her need for additional discovery, including deposition transcripts and a witness list with addresses. She asked that the deadline be put off until after she received these documents, and the

judge gave her 60 days to file motions. In November, the prosecutor consented to a one-month extension. By December 8, the prosecutor still had not provided the witness list or other outstanding discovery, and Moore asked for a second 60-day extension. On the same date Moore and the prosecutor met and identified items the defense needed. Even so, some discovery was not produced until February 9, 2004, and Moore asked for an additional 60 days, to which the prosecutor again consented. As late as April 26, 2003, seven months after Moore's first request, the prosecutor still had not produced the witness list. Moore filed a motion to compel him to do so, and the judge gave him two more weeks to produce the list. *Supra* 21-24.

It is true that not all of these seven months are chargeable to the state, but a significant portion is. Two months were taken up by the court's decision on Brillon's motion to dismiss for lack of a speedy trial (filed February 23, denied April 19) and presumably some time was necessary for defense preparation. These periods were justifiable under *Barker*.[19] But with those exceptions most of the rest of the delay during this seven-month period stems from the prosecutor's dilatory discovery.

Government "lethargy" and indifference count on the state's clock, *Doggett*, 505 U.S. at 653, and "lethargy" describes the final seven months of the

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[19] During part of the period a motion to have Brillon transported to a prison nearer the place of trial was pending but the court never acted on it (filed Oct. 22, "rendered moot" on Nov. 14). J.A. 31.

pretrial period here. The Vermont Supreme Court's opinion does not specify what part of this time it weighed against the state, and the record does not permit any exact calculation. After summarizing the facts, Pet. App. 23-24, the court simply observed that "[d]espite the already significant delay, the prosecution stipulated to several more continuances before a trial was finally held in June 2004." *Id.* at 27. If this was a holding that not all of this final delay was the defendant's fault, the holding should be affirmed as an ordinary application of *Barker*.

IV. THE VERMONT COURT REASONABLY BALANCED THE FOUR *BARKER* FACTORS.

Barker's test identifies the relevant considerations but it announces no rule dictating how the balance should be struck. "A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right." 407 U.S. at 530. Like other ad hoc determinations, and because it is "impossible to determine with precision when the right has been denied," *id.* at 521, judicial review of the balancing process is necessarily deferential and circumspect. *See United States v. Williams*, 372 F.3d 96, 113 (2d Cir. 2004) ("We review the District Court's balancing for abuse of discretion"); *State v. Conrad*, 663 P.2d 1101, 1102 (Idaho 1983) (*Barker* balancing "necessarily rests within the sound discretion of the court based

on the circumstances of the case in which the conduct of both the prosecution and defendant are weighed."). *Cf. Taylor*, 487 U.S. at 337 (in weighing speedy trial act criteria "the district court's judgment of how opposing considerations balance should not lightly be disturbed").

This is especially true of cases coming to this Court from state courts. The speedy trial right serves institutional goals. *Barker*, 407 U.S. at 519. The institution at issue here is Vermont's criminal court system, for which the Vermont Supreme Court bears constitutional responsibility.[20] The Vermont Supreme Court must monitor the system's functioning and labor to correct its malfunctioning. That court knows the problems its state judiciary faces and, if the judiciary's control over those problems is limited, the Vermont Supreme Court knows where the administrative, fiscal and political solutions are to be sought.

Much, though not all, of the three-year delay in this case was rooted in the disorganization of Vermont's system of contract counsel, poor oversight of that system by the DG's office, and the trial court's failure to discharge its independent responsibility for assuring that the problems of the contract-counsel system did not deprive Brillon of responsible representation. Those problems had been a principal subject of the report and recommendations of the Indigent Defense Task Force, two members of which

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[20] Vt. Const., ch. II, § 30.

were appointed by the Vermont Supreme Court,[21] chaired by the court's recently retired chief justice. Shoestring funding of Vermont's public defense system has been an ongoing concern, and the court was certainly aware of the task force findings and recommendations, including the recommendation to augment the assigned counsel contract system with the addition of "regional serious crimes units." Brillon had to wait until August, 2003, until one of those "units," in the person of Kathleen Moore, was assigned. The task force had also recommended an increased public defender budget to keep up with increased costs, Report at 21, and the Vermont Supreme Court in deciding Brillon's case found it appropriate to "encourage the Legislature to examine any unfulfilled needs and address the problem." Pet. App. 38-39.

The Vermont court's conclusion that significant portions of the pretrial delay in this case were the fault of the system and were not chargeable to Brillon was a knowledgeable and correct judgment. Pursuant to *Barker*, the court did not weigh these delays heavily, but the weight it did give them was informed by its local knowledge and concerns. Its resolutions of the other *Barker* criteria – the presumptively prejudicial length of the delay, *id.* 13-15, the defendant's consistent assertions of his right, *id.* 29-30, and the prejudice, *id.* 31-37 – all stand unchallenged. Its balancing of the factors was fully consistent with *Barker.*

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[21] Act No. 152, *supra.*

CONCLUSION

The Vermont Supreme Court correctly held that a substantial part of the egregious delay in this case could not be attributed to the defendant. Fourteen months of nonexistent or nominal representation from June 2002 to August 2003 were the State's responsibility. Trial dates were pushed back by calendaring decisions made *sua sponte*, not by defense-requested continuances. These decisions included a postponement from February 2002 to September 2002 (at the earliest) in part for court-backlog reasons, the tacit disregard of an October 2002 trial setting, and the equally silent vanishing of a May 2003 trial setting after Sleigh withdrew because his contract with the DG had been changed. These overlapping delays are the court's responsibility under settled law. Finally, the prosecutor, by his inaction, shares responsibility for the six months when Brillon lacked counsel altogether (November 2002 to January 2003 and April to August 2003), and months of dilatory discovery after Moore entered the case (September 2003 to April 2004).

The judgment of the Vermont Supreme Court should therefore be affirmed.

Respectfully submitted,

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